

Supreme Court, U. S.
FILED

OCT 28 1976

MICHAEL RUBAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-292

JAMES H. ASHLEY AND PAT MALONEY,

Petitioners,

versus

SAN ANTONIO TELEPHONE COMPANY, INC., ET AL.,

Respondents.

BRIEF IN OPPOSITION TO
AN APPLICATION FOR A
WRIT OF CERTIORARI

JOEL W. WESTBROOK

Attorney for Respondents

Of Counsel:

TRUEHEART, McMILLAN, WESTBROOK

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1910 National Bank of

Commerce Building

San Antonio, Texas 78205

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1910 National Bank of

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San Antonio, Texas 78205

TO THE HONORABLE, THE CHIEF JUSTICE
AND THE ASSOCIATE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES:

The Respondents, SAN ANTONIO TELEPHONE COMPANY, INC., respectfully pray that this Court deny Petitioners' application for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana, rendered in this cause on June 8, 1976.

PRELIMINARY STATEMENT

Pursuant to an agreed division of functions between this Respondent and the United States Department of Justice, Appellate Division, this brief is primarily directed to the contempt status of Petitioner James H. Ashley to whose conduct our motion for show cause order was directed (Tr. 277). The brief to be filed by the Justice Department will direct itself to the conduct of Mr. Ashley's attorney, Pat Maloney, whose contempt adjudication stemmed from an order made by the trial court *sua sponte* (Tr. 280).

QUESTION PRESENTED

The United States Court of Appeals, Fifth Circuit, affirmed an order of the United States District Court for the Western District of Texas, San Antonio Division, holding Petitioners, a non-party witness and his attorney, in contempt of Court for the witness' conscious and deliberate refusal, on his attorney's advice, to obey a subpoena duces tecum of that Court, requiring him to testify and produce certain documents at the

taking of the witness' deposition in Respondent's pending civil anti-trust action.

Prior to the scheduled time of the deposition, the Trial Court had denied the Petitioner Ashley's Motion for Stay of Order Pending Appeal (Tr. 275). At the time set for the deposition, the Petitioners had not yet filed a motion to stay the order of the District Court with the United States Court of Appeals for the Fifth Circuit. Nevertheless, although Petitioner-Attorney Maloney produced his client, Ashley, at the deposition, Ashley abstained, on advice of counsel, from testifying, and did not bring with him, much less produce, certain documents which had been subpoenaed. The only question therefore presented is:

* * * *

Whether it is contemptuous conduct for a witness to refuse to testify and produce documents at a deposition, pursuant to a subpoena to testify and produce documents, in the face of an order from a United States District Court overruling a Motion to Quash said subpoena duces tecum, and in the absence of a stay of such order.

Petitioners state that, "Should the Trial Court's Order be permitted to stand, it sets a precedent for the tenant [sic] that if one resorts to his right of appeal he stands in jeopardy of contempt for resorting to such constitutional right." Such an interpretation is an unreasonable simplification of the facts of this case. Quite to the contrary, a decision supporting Petitioner's argument would be authority for the proposition that if an attorney possesses a good faith belief that he is "right on the law", he may instruct his client to disobey the orders of a United States District Court and the client will not stand in jeopardy of contempt.

The Order of Contempt issued by the Trial Court does stand for the proposition that once the Court has ruled, counsel and others involved in the action must abide by the ruling and comply with the Court's orders, and, once a ruling is made, counsel should not advise a client not to comply with the order.¹

STATUTORY PROVISIONS INVOLVED

18 U.S. C. 401 (3)

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Rule 45 (f), *Federal Rules of Civil Procedure*

(f) *Contempt.* Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued.

Rule 25 (a), *Federal Rules of Appellate Procedure*

(a) *Filing.* Papers required or permitted to be filed in a court of appeals shall be filed with the clerk. Filing may be accomplished by mail addressed to the clerk, but filing shall not be timely unless the papers are received by the clerk within the time fixed for filing, except that briefs and appendices shall be deemed filed on the day of mailing if the most expeditious form of delivery by mail, excepting special delivery, is utilized.

¹The Order of Contempt was not included in the Appendix prepared by Petitioners for their presentation before the Fifth Circuit. It was introduced by Respondent's counsel during oral argument, pursuant to a request from the bench. It is reproduced herein on page "A-1".

If a motion requests relief which may be granted by a single judge, the judge may permit the motion to be filed with him, in which event he shall note thereon the date of filing and shall thereafter transmit it to the clerk.

COUNTER-STATEMENT OF THE CASE

Some of the statements and conclusions contained in Petitioners' "Statement of the Case" are either incorrect or subject to material factual dispute. Respondents feel that some clarification is in order.

Petitioner James H. Ashley was noticed on November 20, 1974 to give his deposition in Respondents' civil anti-trust suit on November 26, 1974. A subpoena to testify and produce documents accompanied said notice (Tr. 258). The following day, November 21, 1974, Petitioner filed a Motion to Quash, a Motion for Protective Order and an Objection to Subpoena, in which the Petitioner requested an Order that the scheduled deposition not be had and that the Court grant Ashley at least one year before appearing as a witness (Tr. 259).

On November 25, 1974, the Defendants in the anti-trust suit [who were also Defendants in a state court suit filed by Petitioners, Tr. 263] filed a Motion to Defer Taking of the Deposition (Tr. 261). On the same day, the Court issued an Order denying Petitioners' motions, but ordered the taking of the deposition be postponed from November 26th until December 16, 1974 (Tr. 262).

Ten days later, on December 4, 1974, Petitioner Ashley filed a Notice of Appeal from the District Court's Order denying his Motion to Quash, Motion for Protective Order and Objection to Subpoena (Tr. 265).

On the same date, Petitioner Ashley moved the District Court for a stay of its prior order pending appeal (Tr. 266). On December 13, 1974, the District Court denied Petitioner Ashley's Motion for Stay Pending Appeal (Tr. 275).

On December 16, 1974, Petitioner Ashley appeared with his attorney at the deposition in response to the Subpoena to Testify and Produce Documents (Tr. 258), and the Court's Order postponing the date of the deposition from November 26, 1974 to December 16, 1974.²

At the time set for the deposition, Respondent's Attorney, Joel W. Westbrook, made inquiry of Petitioner-Attorney Maloney as to whether or not a Motion for Stay of Order of the District Court Pending Appeal had been filed with the Fifth Circuit. Mr. Maloney stated that Mr. Jack Pasqual [an attorney associated with Mr. Maloney] was "in the process" of filing such a motion that morning, and, when asked if Mr. Pasqual was in New Orleans, Mr. Maloney replied, "He is headed that way". However, in truth and in fact Petitioner had merely *placed the motion in the mail* that morning. (Ex. "1", page 3, lines 12-20). Petitioners then declined to testify or produce documents, in Maloney's words, "considering the pending of the Motion to Stay." (Ex. "1", page 10, lines 14- 15.)³

²(The transcript of the proceedings that were had before the Court Reporter was prepared and subsequently introduced into evidence as Plaintiff's Exhibit "1" at the hearing on the Motion to Show Cause [Tr. 289., page 15, lines 13-14].

³An additional pertinent document not included in the appendix Petitioners prepared for the Fifth Circuit is their "Motion for Stay of Order of District Court Pending Appeal", showing a file stamp of December 18, 1974. That document is reproduced herein on page A-4.

Later that day, December 16, 1974, the Respondents presented a Motion for Show Cause Order directed to James H. Ashley (Tr. 277), and the Trial Court subsequently issued an order requiring Ashley to be before the Court on December 20, 1974 to show cause why he should not be held in contempt (Tr. 279). On December 18, 1974, the District Court, *sua sponte*, ordered Petitioner-Attorney Maloney likewise to appear and show cause as to why he should not be held in contempt (Tr. 280). On December 19, 1974, both Petitioners filed verified replies to the Court's Order to Show Cause, and in said replies tendered Petitioner Ashley for deposition and advised that Petitioner-Attorney Maloney had instructed him to fully and fairly testify and produce the matters subpoenaed (Tr. 281).

On December 20, 1974, the Trial Court conducted its hearing on the Show Cause Order (Tr. 289), and found both Petitioners guilty of civil contempt, fined each of them \$500.00 per day until they purged themselves by compliance, and assessed sanctions in the total sum of \$2,000.00 as compensation to Respondent's attorneys. Petitioners' state of contempt, was at most, fleeting, as is evidenced by the following excerpts from the transcript of the hearing.

* * * *

The Court:

Then I'll say this, Mr. Maloney, if you are going to submit your client for deposition and you are going to submit these documents instanter, and the deposition is taken, the documents are deposited in the registry of the Court, then you have purged yourself of contempt and your record is clean. (Page 56, lines 19-24).

The Court:

There will be no penalties imposed except the sanctions that the Court has set if you comply with the orders of this Court and the rules and get this deposition taken. (Page 56, lines 7-10).

* * * *

And:

The Court:

And as long as Mr. Westbrook doesn't think that Mr. Ashley or Mr. Maloney are in contempt and they are purging themselves, I'm satisfied. (Page 64, lines 23-25).

It is abundantly clear from the transcript of the show cause hearing (Tr. 289), that Petitioner's sole legal justification for disobeying the subpoena duces tecum and the various orders of the Trial Court was that,

* * * *

Mr. Maloney:

Because in all good faith I really thought that the stay would be granted. I am really still amaged (sic) quite candidly that it was not. (Page 31, lines 1-3).

* * * *

In fact, Petitioners continue to assert this "justification" in their Petition for Writ of Certiorari: "There is nothing in the Record to suggest that the Petitioners acted other than in good faith, pending disposition of what *they believed* to be a valid appeal." Petition for Writ of Certiorari, (page 7; emphasis supplied).

ARGUMENT

It is undisputed that Petitioner, James H. Ashley did, on December 16, 1974, consciously and willfully refuse to obey the clear and specific command of a subpoena duces tecum issued by the Clerk, United States District Court, for the Western District of Texas, to testify on behalf of Plaintiffs-Respondents, San Antonio Telephone Company, Inc., et al., at the taking of a deposition, and to produce certain documents described in the subpoena issued by the Court.

There can be no question that Courts have inherent power to enforce compliance with their lawful orders through civil contempt. *Shillitani vs. United States*, 384 U.S. 364, 86 Sup. Ct. 1531, 16 L. Ed. 2d 622 (1966). The hallmark of civil contempt is that the sanction imposed is contingent and coercive. After the Trial Court found him in contempt, Petitioner Ashley was immediately extended the opportunity to purge himself of the contempt and thereby avoid the fine. Moreover, Petitioner Ashley's status as a non-party witness did not alter or affect the nature of the contempt, but was significant only in the procedural sense that the contempt order was in his case immediately appealable. *International Business Machines vs. United States*, 493 F. 2d 112 (2d Cir. 1973), at page 115, Footnote 1.

Notwithstanding the inherent authority of Courts to enforce lawful orders through the medium of civil contempt, the specific conduct of Petitioner Ashley fell squarely within the more specific contempt provisions of 18 U.S.C. 401 (3) and Rule 45(f), *Federal Rules of Civil Procedure*. The Court expressly found Petitioner Ashley and his attorney guilty of contempt of the Federal Rules of Civil Procedure and the subpoena duces

tecum issued thereunder. The precise orders of the Court were embodied in the subpoena duces tecum issued by the Clerk pursuant to Respondents' original notice to take Petitioner Ashley's deposition (Tr. 258), as modified by the Court's order of November 25, 1974, which denied Petitioner's motion to quash and postponed the deposition until Monday, December 16, 1974 at 10:00 o'clock a.m. (Tr. 262).

It is settled that neither reliance upon the advice of counsel nor a witnesses' own belief that a subpoena is in any respect invalid excuses disobedience. *Taylor vs. United States*, 221 F. 2d 809 (6th Cir. 1955), cert. denied 350 U.S. 834, 76 Sup. Ct. 69, 100 L. Ed. 744 (1955). Such reliance or belief is properly a matter in mitigation of penalty in true criminal contempt, but it is not a defense in a civil contempt. *United States vs. International Business Machines*, 60 F.R.D. 658, 666 (S.D.N.Y. 1973).

In the recent case of *Maness v. Meyers*, 95 S.Ct. 584, decided January 15, 1975, Chief Justice Burger wrote:

"We begin with the basic proposition that all orders and judgments of courts must be complied with promptly. If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, *but absent a stay, to comply promptly with the order pending appeal.*" (Emphasis supplied.)

Petitioner filed his Notice of Appeal from the order denying his motion to quash and for protective order on December 4, 1974 (Tr. 265). On that same day, he moved for a stay of the order pending appeal (Tr. 266). The District Court denied the motion for stay on December 13, 1974 (Tr. 275). Petitioner's application to

the Fifth Circuit for a stay was not filed with the Court of Appeals until December 18, 1974, two days after his civil contempt was a *fait accompli* (A-4). The act of mailing the application prior to the beginning of the deposition did not constitute timely filing. *Rule 25(a) Federal Rules of Appellate Procedure*. Even if the application had been filed prior to December 16, 1974, the mere filing would not have relieved Petitioner of the duty of complying with the subpoena. Petitioner would have had to go forward and actually obtain an order granting his application for stay prior to disregarding the Court's order. *Pioche Mines Consolidated, Inc. vs. Dolman*, 333 F. 2d 257 (9th Cir. 1964), cert. denied 380 U.S. 956, 85 Sup. Ct. 1081, 13 L. Ed. 2d (1972).

Petitioner's manifest assumption, with respect to both the motion for stay filed with the Trial Court and the application addressed to the Court of Appeals, was that the mailing of the motion or application, without more, relieved him of the burden of complying with the order complained of until such time as the Court acted. How else can we explain Petitioner's apparent failure to press the Trial Court for a favorable decision on the motion for stay? There is no evidence in this record to suggest that Petitioners ever contacted the Court at any time during the ten day period between the filing of the motion (December 3, 1974), and the entering of the order denying the requested relief (December 13, 1974), to ascertain the disposition of the Court. In a very real sense, the phenomenon which has been characterized by Petitioner's counsel as "the proximity of time," resulted from Petitioner's own failure to take timely action to secure a ruling from the Trial Court. To consider this factor as justification for his

admitted disobedience of the Court's order would be to permit Petitioner Ashley to profit from his own neglect.

There was apparently no attempt made by Petitioner Ashley on the morning of December 16, 1974, to secure an order from the Trial Court delaying the taking of the deposition for the short period of time necessary to obtain a ruling from the Court of Appeals (Tr. 289, page 34, lines 23-25), nor did he attempt to secure an agreed delay from Respondents' counsel. In the light of all these circumstances, it is difficult to understand the rationale for Petitioner's assertions in his petition that the Trial Court's ruling in effect punished him for exercising his right of appeal. (Petition for Writ of Certiorari, page 3).

A slightly different variation of Petitioner's "proximity of time" argument is his assertion at various stages of these proceedings, both before and during the show cause hearing, that more time was needed in order to prepare for the deposition. The trial court granted a delay of almost one month in its order of November 26, 1974 (Tr. 262). Notwithstanding this delay, and even though Petitioner Ashley evidently did have time to make statements to the press and to grant extended interviews (Tr. 289, page 10, lines 4-6) concerning his knowledge of the activities of the Bell System, as such knowledge related to Petitioner's pending state court litigation, he persisted in his contention that he was not afforded enough time. It is not surprising that the Trial Court was less than pleased with this state of events. This was clearly not a situation where "the cat was not yet out of the bag," *Maness v. Meyers*, 95 S.Ct. at p. 593.

Another circumstance urged by Petitioner as having

rendered his disobedience non-contemptuous is that he entertained no ill will, bad faith, or other improper motive toward the Court, but merely exercised poor judgment in refusing to obey its command. In essence, he was respectfully disobedient. The law does not deem this circumstance as a proper consideration. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191, 69 S.Ct. 497, 93 L.Ed. 599 (1948). If the act done is clearly in violation of the Court's order, the intention is of no consequence. Civil contempt is a sanction to enforce compliance with an order of the Court and it is not dependent on the state of mind of Petitioner. *N.L.R.B. v. Ralph Printing & Lithographing Co.*, 433 F.2d 1058 (8th Cir. 1970), cert. denied 401 U.S. 925, 91 S.Ct. 883, 27 L.Ed. 2d 829.

One final point, perhaps the most significant in the disposition of this application, is that Petitioner exited the status of civil contempt almost as quickly as he entered it, all during the course of the show cause hearing on December 20, 1974. He loses sight of the fact that he purged himself of the contempt on December 20, 1974, when he did produce the documents called for and when he did reach an agreement with Respondent's counsel as to the taking of his deposition (Tr. 289, page 64-67). The Court's contempt adjudication was expressly contingent upon compliance (Tr. 289, page 52, lines 7-22). Under these facts, Petitioner is virtually seeking the same relief from the Supreme Court that he already secured from the trial court upon compliance. With the possible exception of the compensatory award of Respondents' attorney fees, Petitioner's compliance with the order rendered this appeal moot. *Federal Trade Commission v. Stroiman*, 428 F.2d 808 (8th Cir. 1970).

As to Ashley, a non-party witness, there is no pending controversy other than the reasonableness or necessity of the \$2,000.00 compensatory award, and he has thus far refrained from challenging these matters in the Trial Court, in the Court of Appeals, and in his Petition.

CONCLUSION

The key to the disposition of this application is found in Petitioners' Petition for a Writ of Certiorari, in the "Questions Presented" section:

* * * *

"The Petitioners did appear at the deposition pursuant to subpoena, but abstained from testifying because the Trial Court's order refusing Ashley a stay pending appeal was *being presented* to the Appellate Court, pursuant to the Federal Rules of Appellate Procedure. (Petition for Writ of Certiorari, page 3; emphasis supplied).

* * * *

Under *Maness vs. Meyers*, id., the question is not "was a motion for stay 'being presented'?", but rather, "had a stay been granted?", (at the time of the disobedience of the court's order). Here, the answer is an unequivocal "no".

Regardless of how the facts are shaded, or from what angle they are viewed, the fact remains that Petitioner Ashley, *absent a stay*, did intentionally fail and refuse to obey the order of the trial court.

Although Respondents have incurred significant additional expense in connection with the appeal to the Fifth Circuit and this application for a writ of certiorari above those which the Trial Court's order sought to compensate, no prayer for further compensation will be made herein. *Nelson v. Steiner*, 279 F. 2d 944 (7th Cir. 1960).

PRAYER

WHEREFORE, Respondents respectfully pray that this Court deny Petitioners' Application for a Writ of Certiorari.

Respectfully submitted,

~~The Original Signed~~
By Joel W. Westbrook
JOEL W. WESTBROOK
Attorney for Respondents

Of Counsel:
TRUEHEART, McMILLAN, WESTBROOK
& HOFFMAN
1910 National Bank of
Commerce Building
San Antonio, Texas 78205

CERTIFICATE OF SERVICE

I hereby certify that on this the 15th day of October, 1976, a copy of this Brief in Opposition to an Application for a Writ of Certiorari, was served upon Mr. Pat Maloney, 2001 Frost Bank Tower, San Antonio, Texas, 78205, by deposit in the United States Mail, Return Receipt Requested with adequate postage thereon.

~~The Original Signed~~
By Joel W. Westbrook

Joel W. Westbrook

No. 74-4163

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SAN ANTONIO TELEPHONE
COMPANY, INC., ET AL

V.

AMERICAN TELEPHONE &
TELEGRAPH COMPANY, ET AL.

SA 72 CA 330

U. S. COURT OF APPEALS
FILED

MAR 10 1975

EDWARD J. SWADSWORTH
CLERK

CONTEMPT ORDER

On this the 20th day of December, 1974 came on to be heard orders directing one James H. Ashley and his counsel, Pat Maloney, Esquire, a member of the Bar of this Court, to show cause why they each of them should not be held in contempt of this Court, the order directed to Mr. Ashley being responsive to a motion to show cause theretofore filed by the Plaintiffs herein, and the order directed to Mr. Maloney being by the Court sua sponte; and, after due notice to all the parties herein, and to the Respondents Ashley and Maloney, came all the parties hereto, represented by their respective counsel, and came the Respondent Ashley, represented by his counsel Pat Maloney, Esquire, and came Pat Maloney, Esquire, pro se; and, evidence having been adduced and considered by the Court, together with pleadings herein, Plaintiffs' Motion to Show Cause, and the responses of Respondents to the Court's show orders directed to each of them, and the arguments of counsel being likewise considered, it is the opinion of this Court, and the Court so finds, that the Respondents Ashley and Maloney have been heretofore guilty of conscious and

deliberate contempt of this Court through the failure and refusal of the Respondent Ashley, by and with the counsel and advice of Respondent Maloney, to appear and testify, and produce documents, in accordance with the command of a subpoena duces tecum issued out of this Court, commanding the appearance and testimony, and production of documents, of the Respondent Ashley on the 26th day of November, 1974, as postponed by order of this Court to 10:00 a.m. December 16, 1974; therefore,

It is, accordingly, ORDERED, ADJUDGED and DECREED that the Respondents James H. Ashley and Pat Maloney, Esquire are each in contempt of this Court as heretofore found; and it is further ORDERED that the taking of testimony, and the production of documents, as commanded by the aforesaid subpoena duces tecum, shall commence instantler in this Courtroom, subject to agreement of counsel as to place and as to continuance from day to day; and it is further ORDERED that the Respondents James H. Ashley and Pat Maloney, Esquire are each of them fined Five Hundred (\$500.00) Dollars for each day, or part thereof, that either of them shall continue in contempt of this Court by failure or refusal to obey the immediately foregoing order respecting the taking of testimony and production of documents, and shall be confined to the custody of the United States Marshal for such period as the said contempt shall continue; and, it appearing that in open Court this 10th day of December, 1974 the testimony and documents commanded by the aforesaid subpoena duces tecum have been tendered by the Respondents Ashley and Maloney, the imposition of the aforesaid Five Hundred (\$500.00) Dollars per day fines and confinement in the custody of the United States Marshal is hereby suspended so long as the aforesaid tender of testimony and documents continues; and it

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Working Date	Working Date
Working Period	Working Period
Working Status	Working Status

is further ORDERED that, so long as the aforesaid tender of testimony and documents continues, the Respondents Ashley and Maloney are deemed purged of the contempt heretofore found and adjudged; and, it appearing to the Court that Joel W. Westbrook, Esquire and K. Key Hoffman, Jr., Esquire, attorneys for Plaintiffs herein, have incurred in connection with these contempt proceedings cost, expenses, and fees in the reasonable amount of not less than Two Thousand and no/100 (\$2,000.00) Dollars, it is hereby ORDERED that the Respondents James H. Ashley and Pat Maloney, Esquire shall pay to Joel W. Westbrook, Esquire and K. Key Hoffman, Jr., Esquire the sum of Two Thousand and no/100 (\$2,000.00) Dollars as damages, and not penalty, and as compensation for their cost, expenses, and fees in this behalf expended.

WITNESSED AND JUDGED this 16th day of August, 1974.

John H. Wood, Jr.
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U. S. COURT OF APPEALS
FILED
DEC 18 1974
EDWARD W. WADSWORTH
CLERK

JAMES H. ASHLEY, Appellant

v.

SAN ANTONIO TELEPHONE &
TELEGRAPH COMPANY, ET AL,
Appellees

No. **74-4163**

MOTION FOR STAY OF ORDER OF DISTRICT COURT PENDING APPEAL
TO THE HONORABLE COURT OF APPEALS:

Comes now JAMES H. ASHLEY, a non-party to the above litigation, and Appellant herein, who has timely perfected his appeal to the United States Circuit Court of an order of the District Court; and pursuant to the provisions of Rule 8, Federal Rules of Civil Procedure, files this his Motion for Stay Of Order Of District Court Pending Appeal, and in support hereof shows the Court as follows:

I.

James H. Ashley, Appellant, a non party to this litigation, has been subpoenaed to testify as a witness for Appellee in this cause, (No. SA 72 CA 50- San Antonio Telephone Company, Inc., et al v. American Telephone & Telegraph Company, et al, in the United States District Court for the Western District of Texas, San Antonio Division).

The record in this proceeding will show that the witness Ashley timely filed his Motion To Quash Subpoena to Testify And Produce Records and Documents; Motion for Protective Order and Objections to Subpoena. The aforesaid motions were overruled without hearing by the Trial Court. Appellant, James H. Ashley timely perfected his appeal from said Order to this Honorable Court, contending that the Order of the Hon. John H. Wood, Jr., denying said motions was arbitrary and that the subpoena duces tecum was oppressive and not in compliance with the Federal Rules of Civil Procedure.

(600) First Bank Tower
SAN ANTONIO, TEXAS 78201

II.

Pursuant to Rule 8, Federal Rules of Appellate Procedure, the witness James H. Ashley filed his Motion For Stay of Order Pending Appeal, presented same to the Trial Court, which Motion was Denied on December 13, 1974, the last working day prior to the scheduled Deposition, the Trial Court entered an order denying said Motion For Stay.

No reason was given by the District Judge for his action in denying said Motion For Stay.

III.

The reasons for the relief requested are as follows:

1. The witness Ashley, a few days before being served with the subpoena in question, instituted an action against Southwestern Bell Telephone Company and American Telephone & Telegraph Company (two of the defendants in this cause) for damages. He was joined in said action by the family of T.O. Gravitt, deceased. The said action is pending on the docket of the District Court of Bexar County, Texas, 57th Judicial District, styled: Gravitt & Ashley, et al v. Southwestern Bell Telephone Company, et al, No. 74-CI-13523.
2. The Appellant, Ashley, is not a party to the Federal Court litigation, which has been pending on the docket of the District Court for nearly three years. There have been no real depositions in said Federal Court litigation.
3. The Plaintiffs in the Federal case seek to have this witness bring with him and produce for plaintiffs "all notes and memoranda relating to the allegations in the petition filed in the 57th District Court..." In addition, all of the material sought to be subpoenaed by the Plaintiffs in this case constitute information which is material and pertinent to Ashley's State Court litigation, and not to this cause. American Telephone and Telegraph Company is a party defendant to the State Court case, and issue has not even been joined therein by said defendant.

2-

A-5

4. Appellant has represented to the Trial Court, and does now represent to this Honorable Court that counsel for Plaintiff in the Federal District Court case is simply on a fishing expedition, seeking to bolster his own case to the detriment and harm of this Appellant, by seeking to have him make a wholesale delivery of all his evidence, memoranda and material to be used by him in his State Court case. This is unreasonable, oppressive, and subjects the witness to undue burden.

5. The Federal District Court case is not ready for trial. This witness is available and under the jurisdiction of the United States District Court for the Western District of Texas; he is a resident of San Antonio, Bexar County, Texas; he has a State suit pending, and will not flee the jurisdiction of that Court.

6. The magnitude of the allegations in connection with Ashley's State Court case is such that it requires his total concentration and cooperation with counsel, and will require some four at least 100 days, in order that his State Court case can properly proceed to trial. This Witness has the right to plan his trial strategy in his own State Court case, without having delivered all of his confidential evidence to the Plaintiffs in this case.

7. The Federal Court case in which Appellant seeks to have granted requires this witness to deliver documents consisting of four legal-sized pages, and seeks privileged communications and non-discoverable letters. The granting of the deposition at this time will irreparably prejudice this Witness Appellant in his state court litigation. On the other hand, to stay the Order of the District Judge and postpone the deposition will in no way deter the Federal Court suit.

3-

A-6

The order of the learned trial judge which is appealed herein, is an appealable order. Covey Oil Company et al v. Continental Oil Company, 340 Fed. 2d 963 (1965). The witness Ashley has no relief other than to appeal said order. The witness Ashley could not wait until the final judgment in the case and then appeal, as he was not and is not a party to the litigation.

The witness Ashley will be irreparably harmed and damaged unless the honorable Appellate Court stays said order pending determination of his appeal.

IV.

The following parts of the record are filed with this motion and attached hereto and made a part hereof for all purposes:

1. Subpoena To Testify and Produce Documents with Attachments;
2. Motion to Quash Subpoena to Testify and Produce Documents; Motion for Protective Order and Objection to Subpoena;
3. Defendants' Motion to Defer Taking of Deposition of the Witness, James H. Ashley;
4. Order, entered the 25th day of November, 1974, denying the aforesaid Motion of the witness Ashley;
5. Plaintiffs' Motion to Award Order Postponing Deposition of James H. Ashley;
6. Motion to Stay of Order Pending Appeal;
7. Plaintiffs' Response to Witness Ashley's Motion for Stay of Order Pending Appeal;
8. Witness Ashley's Reply to Plaintiffs' Response to Motion for Stay of Order Pending Appeal;
9. Defendants' Second Motion to Defer Taking of the Deposition of James H. Ashley;
10. Order of December 13, 1974, denying Motion for Stay of Order Pending Appeal filed by the witness James H. Ashley;
11. Order of December 13, 1974, denying Defendants' Second Motion to Defer Taking of the Deposition of James H. Ashley;
12. Order of December 13, 1974, denying Plaintiffs' Motion to Award Order Postponing Deposition of Witness James H. Ashley.

WHEREFORE, JAMES H. ASHLEY, by and through his undersigned counsel, prays that the Honorable District Court stay the order of the District Court pending appeal.

Respectfully submitted,

144 OFFICES OF PAT MALONEY

Pat Maloney
Pat Maloney
Attorney for James H. Ashley

STATE OF TEXAS

COUNTY OF BEXAR

Before me, the undersigned authority, on this day personally appeared James H. Ashley, known to me to be the Appellant, and after being by me first duly sworn upon his oath stated that he has read the allegations in the foregoing and they are true and correct.

James H. Ashley
James H. Ashley

WITNESSED TO AND SUBSCRIBED before me by the said James H. Ashley, on this the 16th day of December, 1974.

Notary Public
Notary Public, Bexar County, Texas

Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing Motion for Stay of Order of District Court Pending Appeal was mailed by United States Certified Mail, Return Receipt Requested, to MICHAEL GREEN, Esquire, Green, Kaufman & Lanfear, 900 Alamo National Building, San Antonio, Texas 78205; JOHN W. WESTERHOOD, Esquire, 1910 National Bank of Commerce Building, San Antonio, Texas 78205; J. BURRISON SMITH, Esquire, Cox, Smith, Smith, Hale & Gunther, 500 National Bank of Commerce Building, San Antonio, Texas 78205; ROBERT L. SIEGEL, Esquire, 54th Floor, The First International Building, Elm & Field Street, Dallas, Texas 75202; and DENNIS, BALLANTINE, BUCHHEIT, FARMER & WOOD, 140 Broadway, New York, New York 10005 on this the 16th day of December, 1974.

Pat Maloney
Pat Maloney

A true copy
Tested and sworn to before me
Notary Public, U. S. Court of Appeals, Fifth Circuit
AB. Johnson
AB. Johnson
Notary Public, New Orleans, Louisiana
DEC 18 1974

AM Form No. 100
For use by the
Circuit Courts of Appeals
January 8, 1933

RECEIPT FOR PAYMENT

United States Court of Appeals

FOR THE FIFTH CIRCUIT

OFFICE OF THE CLERK

Received
From

Pol Maloney

8-463 *Archie M. Maloney* *12/18/34*

AMOUNT
\$ *10.00*

Minutemen's Pass
Certified copy of
Copy of Opinion
Copy of Certificate of Admission
Copy of Court Rules

Check ☒
Debit ☒
Cash ☒

TOTAL *10.00*

E-860
31201

A true copy
Teste: *Edward W. Haddock*
Clerk, U. S. Court of Appeals, Fifth Circuit
H. B. Johnson
Dec 18 1934